

STATE OF MONTANA
BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT
NO. 4647-s43Q BY NOEL E. MEISNER

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

APR 7 1990

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on June 30, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 3 cubic feet per second or 1,347 gallons per minute of water and not to exceed 5 acre-feet per annum from Canyon Creek, a tributary of the Yellowstone River, in Yellowstone County, to be diverted from said creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 21, Township 1 South, Range 25 East, M.P.M., and stored in a 1-acre-foot stock-watering pond located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 21, Township 1 South, Range 25 East, to be used from January 1 to December 31, inclusive, of each year.
2. The Permittee shall, as the water is available on this stream, ensure that 1 cubic foot per second of water is allowed to flow past the point of diversion in order to ensure that the Harry L. Barker and Robert J. Bernhardt livestock watering rights are protected.
3. The Permittee shall submit proposed engineering specifications to the Department for his proposed means of diversion for approval prior to construction. The Department shall submit such specifications and proposals to the Objectors and shall solicit their comments before granting approval. After the Department has received the comments from the Objectors, it shall examine such specifications and shall grant approval only if it is determined that such proposed means of diversion are designed to eliminate the possibility of chance of downstream damages occurring as a result of this Application.
4. The Department by approving such specification does in no way assume any liability connected therewith.
5. The permit is granted subject to all prior water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana law.
6. At the discretion of the Department of Natural Resources and Conservation, the Permittee shall install and maintain adequate measuring

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devices to enable the Applicant to keep a record of all quantities of water diverted as well as the periods of diversion.

RECOMMENDATION

The Department recommends that all parties in this matter properly install and maintain adequate measuring devices to fit their particular individual situation where necessary and practical, and keep a log of records of water used for their own proof and protection of their water rights.

Done this 9th day of August, 1976.

Erwin Ferris

Administrator, Water Resources Division
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation
Natural Resources Building
32 South Ewing
Helena, MT 59601

CASE # 4647

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION
STATE OF MONTANA

IN THE MATTER OF BENEFICIAL)	
WATER USE PERMIT NO. 4647-s43Q)	<u>PROPOSAL FOR DECISION</u>
BY NOEL E. MEISNER)	

Pursuant to the Montana Water Use Act and Administrative Procedures Act, after due notice, a hearing on objections to the above-named Application was held on December 5, 1975, at Billings, Montana. The Applicant, Mr. Noel E. Meisner, appeared at the hearing and presented testimony on behalf of his application.

The following filed with the Department a timely objection to the above application: Mrs. Leonora E. Toole, Mr. and Mrs. Pete and Adele Milohov, Mrs. Ivalee Bernhardt, Mr. Harry L. Barker, and Mr. and Mrs. R.A. and Margaret Saunders. Mrs. Leonora E. Toole, Mr. and Mrs. R.A. and Margaret Saunders, Mrs. Ivalee Bernhardt, and Mr. and Mrs. Pete and Adele Milohov all appeared at the hearing and presented testimony on behalf of their objection. Mr. Robert Bernhardt appeared and presented testimony on behalf of the objection of his wife, Mrs. Ivalee Bernhardt and his father-in-law, Mr. Harry L. Barker.

A Proposal for Decision was submitted to the parties, hereto, on April 12, 1976. Timely exceptions to the Proposal were filed with the Department by Mr. Robert J. Bernhardt on behalf of his

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wife's objection, Leonora E. Toole, Mr. and Mrs. Pete and Adele Milohov and Mr. and Mrs. R. A. and Margaret Saunders. Since the exceptions filed by the parties seem to deal more with the wording of the Proposal for Decision, this new Proposal is being submitted to the parties in order to expedite this particular application. Mr. Bernhardt, in his exception, requested that 1 cubic foot of water per second be allowed to flow past the point of diversion in order to ensure that the Harry L. Barker and Robert J. Bernhardt livestock have water. The other Exceptors requested that they would like to see and examine and be able to confer with those involved as to any plans and engineering specifications for the proposed means of diversion. They would also request that the Department, before they approve such proposed means of diversion, to consult with the Exceptors before granting final approval.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact and Conclusions of Law and Order:

PROPOSED FINDINGS OF FACT

1. On January 21, 1975, at 11:03 a.m., the Applicant submitted to the Department an Application for Beneficial Water Use Permit seeking to appropriate 3.00 cubic feet per second or 1,347 gallons per minute of water, not to exceed 5 acre-feet per annum, from Canyon Creek, a tributary of the Yellowstone

River, in Yellowstone County, Montana. The water is to be diverted from Canyon Creek at a point in the E1/2 NE1/4 of Section 21, Township 1 South, Range 25 East, Montana Principal Meridian, and used for stockwatering purposes from January 1 to December 31, inclusive, of each year.

2. From testimony received from the Applicant and the Objectors at the hearing it appears that the land description cited above that was advertised and in the application is wrong. From testimony taken at the hearing, it appears that the point of diversion is in the SW1/4 SW1/4 NE1/4 of Section 21, Township 1 South, Range 25 East, Montana Principal Meridian. The place of sue will be in a 1-acre pond, approximately 5 feet in depth, located in the SE1/4 SW1/4 NE1/4 of Section 1, Township 1 South, Range 25 East, Montana Principal Meridian. The water so diverted and impounded in the pond will be used for stockwatering from January 1 to December 31, inclusive, of each year, with a secondary use being a duck pond.

3. From testimony at the hearing, from the objectors, it appears that there is at times during the year excess water in Canyon Creek. Canyon Creek is a stream that flows during periods of high rain and excess snowmelt. During such times of high runoff, it causes a great deal of washing and damage to its surrounding banks.

4. The Objectors have prior existing rights to the waters of Canyon Creek for both irrigation and stockwatering purposes. All of the Objectors' property is located in the general vicinity of this application along Canyon Creek.

5. The Objectors, Harry L. Barker and Mrs. Ivalee Bernhardt,

water their cattle on Canyon Creek between the proposed point of diversion and the proposed point of return. The Barkers and the Bernhardtts have watered up to 250 head of livestock. Mr. Jerry Jacob, District Conservationist with the Soil Conservation Service, estimated that 1 cubic feet of water would be needed flowing past the proposed point of diversion in order to satisfy the livestock watering requirements of the Barkers and the Bernhardtts. This flow figure based on his estimate would be even more critical during the winter months when you have substantial freezing on Canyon Creek.

6. The Applicant will divert through a pipe along a horseshoe along Canyon Creek into his pond. Once the pond is filled the water will be directed and allowed to flow through the system back into Canyon Creek.

7. While the Objectors voice some concern as to their interference with their water rights by this application, they were principally concerned with the proposed means of diversion. Because Canyon Creek sometimes goes on a rampage causing great washing to the banks in the vicinity, there is a great deal of concern as to whether his diversion works are adequate or not. If they were not adequate and were to wash out, this would cause a straightening of the creek, which would in turn increase the velocity downstream, thus increasing the possible damages downstream from the proposed point of diversion.

8. A field check of the proposed site was made by the Hearing Examiner the afternoon of December 5, 1975.

From the foregoing Proposed Findings of Fact, the Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a permit is required to appropriate water from Canyon Creek.

2. There are at times unappropriated waters in the source of supply, principally in early spring when the snows are melting and during a period of high rain.

3. Filed prior water rights of prior appropriators of water from Canyon Creek must, by statute, be protected.

4. The rights of prior appropriators will be protected if the permit is conditioned to protect those rights.

5. The Objectors presenting evidence at the hearing appear to have valid use rights and filed rights along Canyon Creek.

6. The proposed means of diversion must be adequate so as to protect the downstream land and property of the Objectors.

7. The proposed means of diversion is not adequate. Because of the hazard involved, the proposed means of diversion must be carefully engineered so as to eliminate the possibility of downstream damages.

8. The proposed use of the water constitutes beneficial use. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

9. The Application for Beneficial Water Use Permit should be granted in accordance with the provisions of Chapter 8, Title 89 of the Revised Codes of Montana.

10. Nothing decided herein has bearing upon the status of water rights claimed by the Applicant other than those applied for, or does anything herein have bearing upon status of claimed rights of any other party, except in relation to those rights herein applied for, to the extent necessary to reach a conclusion herein.

Based upon the above Proposed Findings of Fact and the Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions cited below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of no more than 3.00 cubic feet per second or 1,347 gallons of water per minute, not to exceed 5 acre-feet per annum from Canyon Creek at a point in the SW1/4 SW1/4 NE1/4 of Section 21, Township 1 South, Range 25 East, Montana Principal Meridian, and used for a stockwatering pond in the SE1/4 SW1/4 NE1/4 of Section 21, Township 1 South, Range 25 East, Montana Principal Meridian, and used from January 1 to December 31, inclusive, of each year.

2. The Applicant shall, as the water is available on this stream, ensure that 1 cubic feet of water per second is allowed to flow past the point of diversion in order to ensure that the Harry L. Barker and Robert J. Bernhardt livestock watering rights are protected.

3. The Applicant shall submit proposed engineering specifications to the Department for his proposed means of diversion for approval prior to construction. The Department shall submit such specifications and proposals to the Objectors and shall solicit their comments before granting approval. After the Department has received the comments from the Objectors, it shall examine such specifications and shall grant approval only if it is determined that such proposed means of diversion are designed to eliminate the possibility of chance of downstream damages occurring as a result of this Application.

4. The Department by approving such specification does in no way assume any liability connected therewith.

5. The permit is granted subject to all prior water rights in the source of supply, and any final determination of prior existing water rights as provided by Montana law.

6. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain adequate measuring devices to enable the Applicant to keep a record of all quantities of water diverted as well as the periods of diversion.

NOTICE

This is a Proposed Order and will not become final until accepted by the Administrator of the Water Resources Division of

the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 30th day of June, 1976.

Gary L. Spaeth
GARY L. SPAETH
HEARING EXAMINER